FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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No.

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters

Petitioner,

vs.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, LOS PINTOS, 7TH STEP FOUNDATION, INC. (CALIFORNIA AFFILIATES), PRISONERS' UNION, and THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

The petitioner, Viola N. Richardson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the

State of California entered in this proceeding on March 30, 1973.

OPINION BELOW

The opinion of the Supreme Court of California, reported at *Ramirez v. Brown*, 9 C.3d 199, ... P.2d ....., ... Cal.Rptr. ..... (1973), appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of California was entered in bank on March 30, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC, Section 1257(3).

QUESTION PRESENTED

Whether Article II, Section 3, of the California Constitution, which provides that no person "convicted of an infamous crime" shall exercise the privileges of an elector in California, and Article XX, Section 11, of the California Constitution, which denies the right of suffrage to "persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes," and Sections 310, 321, 383, 389, 390, 14240, and 14246 of the California Elections Code, which implement the above constitutional disqualifications, violate the equal protection clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 2:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

California Constitution, Article II, Section 3:

> "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, *person convicted of an infamous crime,* nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." (Emphasis supplied.)

California Constitution, Article XX, Section 11:

> "Laws shall be made to exclude from office, serving on juries, and from the right of suffrage,

persons convicted of bribery, perjury, forgery, malfeasance in office, or *other high crimes.* The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice." (Emphasis supplied.)

California Elections Code:

Sections 310, 321, 383, 389, 390, 14240, and 14246. (Set forth in the appendix hereto.)

California Penal Code:

Sections 1203.4(a), 4852.01, 4852.13, 4852.16, and 4852.17. (Set forth in the appendix hereto.)

STATEMENT OF THE CASE

The respondents, three ex-felons, sought a writ of mandate to compel election officials to register them as voters.[1] The original jurisdiction of the California Supreme Court was properly invoked per *Jolicoeur v. Mihaly,* 5 C.3d 565, 570, footnotes 1 and 2, 488 P.2d 1, 3, 96 Cal.Rptr. 697, 699 (1971). Respondent Ramirez had been convicted in Texas of the felony "robbery by assault" in 1952. In 1972 he applied to register to vote in San Luis Obispo County, California, but was refused registration by the San Luis Obispo County Clerk. Respondent Lee had been convicted of the felony of "possession of heroin" in 1955.

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[1]Petitioner was joined as a Respondent below upon application. *Ramirez v. Brown, supra,* 9 C.3d 199, 202, and N. 1, ____ P.2d ____, ____ Cal.Rptr. ____ (1973).

In 1972 he applied to register to vote in Monterey County, California, but was refused registration by the Monterey County Clerk. Respondent Gill had been convicted of the felony of "second degree burglary" in 1962 and 1967 and of the felony of "forgery" in 1957. In 1972 he applied to register to vote in Stanislaus County, California, but was refused registration by the Stanislaus County Clerk. *(Ramirez v. Brown, supra,* 9 C.3d 199, 202, ... P.2d ....., Cal.Rptr. ..... (1973); page iii of appendix hereto.)

The California Supreme Court, relying primarily on *Dunn v. Blumstein,* 405 U.S. 330 (1972), held that "disfranchisement by reason of conviction of crime is no longer constitutionally permissible" and, "as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of Article II and Article XX, Section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification, violate the Equal Protection Clause of the Fourteenth Amendment." *(Ramirez v. Brown, supra,* 9 C.3d 199, 202, 216-217, ... P.2d ....., ... Cal. Rptr. ..... (1973), citation omitted, footnote omitted; page xxvii of appendix hereto.)

REASONS FOR GRANTING THE WRIT

I. DISENFRANCHISEMENT OF PERSONS CONVICTED OF CRIME DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION OF THE LAWS.

The disenfranchisement of ex-felons has been universally approved in the federal courts. The argument that such disenfranchisement constitutes a denial of equal protection has been universally rejected. In *Green v. Board of Elections of the City of New York,* 380 F.2d 445 (2d Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968), the court stated that:

> "A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be."
>
> *(Id.,* at 451-452.)

Similarly, in *Beacham v. Braterman,* 300 F.Supp. 182 (S.D. Fla. 1969), aff'd mem., 396 U.S. 11 (1969), it was noted specifically that:

> "The initial question before the court is whether a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. We hold that the state may do so and that the Florida constitutional and statutory provisions which affect that exclusion are valid."
>
> *(Id.,* at 183.)

In *Kronlund v. Honstein,* 327 F.Supp. 71 (N.D. Ga. 1971), a Georgia statute disenfranchised those persons convicted of a crime involving moral turpitude. The

statute was attacked by a convicted heroin smuggler, but the court held that:

> " * * * a state may prohibit idiots and insane persons, as well as, those convicted of certain offenses from participating in her elections."
> *(Id.,* at 73.)

Stephens v. Yeomans, 327 F.Supp. 1182 (D. N.J. 1970), did disapprove disenfranchisement based upon a criminal conviction. But the court there based its conclusion upon the inconsistent development of New Jersey voter classification. *(Id.,* at 1188; see *Kronlund v. Honstein, supra,* 327 F.Supp. 71, 73-74.) In contrast, California disenfranchisement provisions are legislatively and judicially consistent. The California Constitution of 1849 provided, in Article II, Section 5, that:

> "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector."

The California Constitution of 1879, in Article II, Section 1, adopted the terms:

> " * * * No idiot, no insane person, no person convicted of any infamous crime * * * ."

By referendum on November 7, 1972 (Proposition 7), the voters of the State of California reenacted Article II, Section 1, of the Constitution of the State of California as Article II, Section 3, as a mandate to the Legislature of this state, requiring the Legislature to provide that no "* * * person convicted of an infamous crime, nor person convicted of embezzlement

or misappropriation of public money, shall exercise the privileges of an elector in this state."

The California Supreme Court defined "infamous" as all felonies in *Ex parte Westenberg,* 167 C. 309, 139 P. 674 (1914), stating:

> "Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies, as the punishment therefor is imprisonment in the state prison."
> *(Id.,* at 319, 139 P. at 679.)

In 1966, *Otsuka v. Hite,* 64 C.2d 596, 414 P.2d 412, 51 Cal.Rptr. 284, the Supreme Court explained that a crime may be deemed infamous only by an inquiry focused precisely on the nature of the crime itself rather than solely upon the "nature of the punishment." California disenfranchisement provisions prior to the decision in *Otsuka* thus appeared identical to those of Florida as upheld in *Beacham v. Braterman, supra,* 300 F.Supp. 182 (S.D. Fla. 1969). *Otsuka,* however, did not hold that the California disenfranchisement provisions were no longer applicable to convicted felons. Rather, *Otsuka* gave credence to the second portion of the *Westenberg* definition—"by reason of their nature." Thus, *Otsuka* in no way suggests that the disenfranchisement of felons is not constitutionally permitted. Disenfranchisement is to be based upon the nature of the crime itself and not simply upon the nature of the punishment.

A recent federal case out of the Ninth Circuit has done much to confuse the issue. The court in *Dillenburg v. Kramer,* 469 F.2d 1222 (9th Cir. 1972), fo-

cused its analysis of disenfranchisement of convicted felons upon *Dunn v. Blumstein, supra,* 405 U.S. 330 (1972), as did the California Supreme Court when it decided the case now at bench. In *Dillenburg,* a parolee who had unsuccessfully attempted to have his civil rights restored was denied registration because of the disenfranchisement provisions of the laws of the State of Washington. (See *Dillenburg v. Kramer, supra,* 469 F.2d 1222, 1223, and N. 1.) The Court of Appeals, contra to the determination of the District Court to dismiss the complaint for failure to present a substantial federal question, held that a "substantial federal question" was presented by the issue of disenfranchisement for conviction of crime as a contravention of the Equal Protection Clause of the Fourteenth Amendment and remanded the case to the District Court for further proceedings.[2]

The California Supreme Court, below, held that disenfranchisement of convicted felons was indeed a violation of the Equal Protection Clause. Both courts rely upon the *Dunn* pronouncement that, "to decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental

[2]See *Fincher v. Scott,* 352 F.Supp. 117 (M.D. N.C. 1972), aff'd mem., 41 U.S.L.W. 3594 (U.S. May 7, 1973), discussed *infra.* There, the disenfranchisement laws of North Carolina were unsuccessfully challenged before a three-judge District Court. On appeal, appellees moved to affirm on the ground that the question was so unsubstantial as not to warrant further argument. The judgment was affirmed, however, "Mr. Justice Douglas would note probable jurisdiction and set the cases for oral argument." 41 U.S.L.W. 3594.

interests asserted in support of the classification." *Dunn v. Blumstein, supra,* 405 U.S. 330, ..., 31 L.Ed. 2d 274, 280 (1972).

The *Dunn* court, citing *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969), then went on to state that:

> "If a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the court must determine whether the exclusions are necessary to promote a *compelling* state interest' [citations]."
>
> *(Dunn v. Blumstein, supra,* 405 U.S. 330, ..., 31 L.Ed.2d 274, 281 (1972), original emphasis.)

Petitioner submits, however, that both the Ninth Circuit Court of Appeal and the California Supreme Court were in error when they placed reliance upon *Dunn. Dunn v. Blumstein, supra,* dealt with a challenge to state durational residence laws as a ban to the registration of voters. Both *Dillenburg v. Kramer, supra,* and the case now before this Court deal with a challenge to the disenfranchisement of convicted felons, a disenfranchisement *specifically excepted from the equal protection clause by Section 2 of the Fourteenth Amendment.*

A. Section 2 of the Fourteenth Amendment authorized disenfranchisement of convicted felons.

It has been consistently held by this Court that Section 2 of the Fourteenth Amendment permits the states to disenfranchise for crime. In *Davis v. Beason,* 133 U.S. 333 (1890), it is stated that:

"In our judgment [a statute] * * * which provides that 'no person * * * convicted of treason, felony or bribery in this territory * * * is permitted to vote at any election * * * ' is not open to any constitutional or legal objection."

(Id., at 133 U.S. 333, ..., 33 L.Ed. 637, 641.)

In *Trop v. Dulles,* 356 U.S. 86 (1958), this Court stated that:

"A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

(Id., at 96-97. Footnotes omitted.)

And in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959), it was stated that:

"Residence requirements, age, previous criminal record [citation] are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters."

(Id., at 51.)

Section 2 of the Fourteenth Amendment provides, in part, that:

" * * * When the right to vote at any election * * * is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way

> abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced * * * ."

Thus, petitioners submit, as Section 2 of the Fourteenth Amendment expressly allows the disenfranchisement of felons without any reduction of representation in the House of Representatives, a general disenfranchisement of convicted felons is allowed.

Petitioner's position is supported by the federal courts. In 1873, in *United States v. Anthony,* 24 Fed. Case No. 14,459, p. 829 (C.C. N.D. N.Y. 1873), the court spoke of disenfranchisement for crime as allowed by Section 2 and noted as follows:

> "This view is assumed in the second section of the Fourteenth Amendment, which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants."
>
> *(Id.,* at 831.)

And in *Green v. Board of Elections of the City of New York, supra,* 380 F.2d 445 (2nd Cir. 1967), it was noted that:

"The framers of the [14th] amendment * * * could hardly have intended the general language of § 1 to outlaw discrimination which § 2 expressly allowed without the penalty of reduced representation. * * * We see nothing in the language or in history to support [the] suggestion that 'other crimes' meant only a crime connected with the rebellion. The court's rejection of Mr. Justice Harlan's position that §2 is the only portion of the Fourteenth Amendment dealing with voting rights, see *Reynolds v. Sims,* supra, 377 U.S. at 589, 84 S.Ct. 1362, 12 L.Ed.2d 506 in no way indicates it would deny that § 1 of the amendment cannot be fairly read to prohibit a discrimination which § 2 expressly permits—especially in the light of the Justices' frequent and consistent statements approving voting disqualification for felony."

(Id., at 452. Footnote omitted.)

In *Kronlund v. Honstein, supra,* 327 F.Supp. 71 (N.D. Ga. 1971), the court found that:

"In determining that there has been a violation of * * * Fourteenth Amendment rights, the exclusionary language of Section 2 of the Fourteenth Amendment must be considered. This court concurs in the opinion expressed on this matter by Judge Friendly in *Green v. Board of Elections of New York,* 380 F.2d 445 (2d Cir. 1967). In that case, it was suggested that the Section 2 language may be dispositive of the question of whether the states can pass disenfranchisement laws. This is so because although Section 2 provides a penalty for denying qualified persons the right to vote, at the same time, it specifically ex-

> cepts from its coverage, state action limiting the right to vote 'for participation in rebellion or other crime.'"
>
> *(Id.,* at 74.)

Any examination of voting rights and denial thereof based upon the Equal Protection Clause of Section 1 of the Fourteenth Amendment must thus take into account the express exceptions of Section 2 of the amendment. Section 1 cannot prohibit what is allowed by Section 2. The latter section speaks of male inhabitants, twenty-one years old, citizens, who have not participated in rebellion "or other crime." It is submitted that, as women's suffrage and the eighteen-year-old vote were provided for by constitutional amendment, only such constitutional amendment can enfranchise aliens, rebels, and felons.

This Court has recently affirmed a decision of the United States District Court for the Middle District of North Carolina which appears to be on-all-fours with the position of the petitioner herein and virtually in direct conflict with the decision of the California Supreme Court below. In *Fincher v. Scott,* 352 F.Supp. 117 (M.D. N.C. 1972), aff'd mem., 41 U.S.L.W. 3594 (U.S. May 7, 1973), a convicted felon was refused registration to vote because he was a convicted felon whose rights of citizenship had not been restored. (See California Penal Code, Sections 1203.4(a), 4852.01, 4852.13, 4852.16, 4852.17 set forth in appendix hereto.) An action was taken before a three-judge district court seeking declaratory and injunctive relief against the applicable statutory and

constitutional provisions of North Carolina depriving convicted felons of the right to vote.[3]

In dismissing the complaint and denying the relief sought, Circuit Judge Craven, speaking for the court, most effectively argues the position of the petitioner herein. He notes:

> "[The North Carolina] provisions are attacked as being a denial of equal protection in violation of U. S. Const. amend. XIV, § 1, * * *.
>
> * * *
>
> "A contention that provisions of state law like those before us violate the equal protection clause also was made in *Green v. Board of Elections*, 380 F2d 445 (2d Cir. 1967).
>
> 'Plaintiff places heaviest weight on the equal protection clause of the Fourteenth Amendment, relied upon in such landmark decisions as the apportionment cases, *Baker v. Carr*, 369 U.S. 186 [82 S.Ct. 691, 7 L.Ed.2d 663] (1962);

[3] As noted by the court in *Fincher v. Scott*, 352 F.Supp. 117, 118:

> "The Constitution of North Carolina, art. VI, § 2(3) provides:
>
> "'*Disqualification of felon:* No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to rights of citizenship in the manner prescribed by law.'
>
> "N.C.Gen.Stat. § 163-55(3) provides:
>
> "'The following classes of persons shall not be allowed to register or vote in this State:
>
> . . . . . .
>
> "'(3) Persons who have been convicted, or who have confessed their guilt in open court, upon indictment, of any crime the punishment for which now or may hereafter be imprisonment in the State's prison, unless he shall have had his rights of citizenship restored in the manner prescribed by law.'"

Gray v. Sanders, 372 U.S. 368 [83 S.Ct. 801, 9 L.Ed.2d 821] (1963), and *Reynolds v. Sims,* 377 U.S. 533 [84 S.Ct. 1362, 12 L.Ed.2d 506] (1964); and the voter qualification cases, *Carrington v. Rash,* 380 U.S. 89 [85 S.Ct. 775, 13 L.Ed.2d 675] (1965) and *Harper v. Virginia Board of Elections,* 383 U.S. 663 [86 S.Ct. 1079, 16 L.Ed.2d 169] (1966). But none of those decisions intimates that the states are without power to continue their historic exclusion from the franchise of persons convicted of all or certain types of felonies. Even though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized —indeed put forward by the Justices to illustrate what the states may properly do—that such expressions cannot be dismissed as unconsidered dicta.' 380 F.2d at 451.

"We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the Equal Protection Clause. * * * *"

* * *

" * * * Putting it positively, we think § 1 must be read in light of § 2, and, so read, denial of the franchise to felons is specifically excepted from the Equal Protection Clause contained in § 1.

"While it may be more desirable from a correctional point of view to give felons the right to vote, Comment, 50 N.C.L. Rev. 903, 909-10 (1972), we are convinced the states are not constitutionally required to do so."

Fincher v. Scott, supra, 352 F.Supp. 117, 118-119 (M.D. N.C. 1972).

The correctness of the decision below is thus open to serious question. The California Supreme Court has held unconstitutional, on the basis of the Equal Protection Clause of the Fourteenth Amendment, Section 1, various California constitutional and statutory provisions relating to disenfranchisement for crime without due regard for the declaration of Section 2 of that amendment which excepts such disenfranchisement from the purview of the Equal Protection Clause. The California Supreme Court is in conflict with the United States District Court for the Middle District of North Carolina and has decided a substantive federal question in a way not in accord with the decisions of this and other federal courts. These conflicts justify the exercise of this Court's discretion to issue a writ of certiorari to review the judgment below.

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

DUNCAN M. JAMES,
District Attorney of the County of Mendocino,
Counsel for Petitioner.

JONATHAN M. LEHAN,
Deputy District Attorney,
Of Counsel.

Dated: May 18, 1973.

(Appendix Follows)

Appendix

In the Supreme Court
of the
State of California

In Bank

S.F. No. 22916

Abran Ramirez et al.,
Petitioners,
vs.
Edmund G. Brown, Jr., as Secretary of State, etc., et al.,
Respondents.

[Filed Mar. 30, 1973]

Opinion

This is a proceeding for writ of mandate brought by three ex-felons to compel respondent election officials to register them as voters. The case calls into question once again the constitutionality of provisions of California law excluding from the franchise all persons who have been convicted of an "infamous crime." We addressed ourselves to this problem seven years ago in Otsuka v. Hite (1966) 64 Cal.2d 596. Petitioners now ask us to consider the matter further

in the light of significant intervening developments in the law of equal protection. As will appear, we conclude that under present standards disfranchisement by reason of conviction of crime is no longer constitutionally permissible.

Petitioner Ramirez is a 43-year-old farmworker, married, with five children. Twenty-one years ago he was convicted in Texas of a felony entitled "robbery by assault." He avers that the offense arose out of an argument in a restaurant, and that at the trial he was without counsel and pleaded guilty on the advice of the judge. After serving only three months in jail he was released on parole. His parole successfully terminated 11 years ago.

In February 1972 petitioner applied to register to vote in San Luis Obispo County. He was refused registration by respondent San Luis Obispo County Clerk on the sole ground that he had been convicted of a felony and had spent some time in incarceration.

Petitioner Lee, a resident of Salinas, is 54 years old, married, with four children. Eighteen years ago he was convicted of the felony of possession of heroin. After serving two years in prison he was released on parole. His parole successfully terminated 14 years ago.

In March 1972 petitioner applied to register to vote in Monterey County. He was refused registration by respondent Monterey County Clerk on the sole ground that he had been convicted of a felony and had not obtained a pardon from the Governor.

Petitioner Gill is a 45-year-old winery worker, married, with four children. He was convicted in 1952 and 1967 of second degree burglary, and in 1957 of forgery. He avers that his offenses arose out of efforts to obtain money to support a narcotics addiction. On each conviction he served some time in prison, followed by a successful parole.

In April 1972 petitioner applied to register to vote in Stanislaus County. He was refused registration by respondent Stanislaus County Clerk on the sole ground of his prior felony convictions.[1]

Petitioners invoke the original jurisdiction of this court, and seek relief by writ of mandate. For the reasons stated in Jolicoeur v. Mihaly (1971) 5 Cal.3d 565, 570, footnotes 1 and 2, the case falls within the limited category in which we deem it proper to exercise original jurisdiction, and the prayer is for the appropriate remedy. (Accord, Young v. Gnoss (1972) 7 Cal.3d 18, 21; Wenke v. Hitchcock (1972) 6 Cal.3d 746, 750-751.)

Our alternative writ of mandate directed that respondents "register to vote all ex-felons whose term[s] of incarceration and parole have expired and who upon application demonstrate that they are otherwise fully qualified to vote," or show cause why this should not be done. The clerks of San Luis Obispo, Mon-

[1]The remaining petitioners are the League of Women Voters and three nonprofit organizations which support the interests of ex-convicts. The Secretary of State is named as a respondent in his capacity of chief elections officer of California. Upon application we ordered the Mendocino County Clerk joined as an additional party respondent.

terey and Stanislaus counties decided not to contest the issue and advised the court they will hereafter register all such ex-felons who apply, presumably including the present petitioners. It does not follow, however, that this proceeding should be dismissed as moot. The acquiescence of the three named county clerks is in no way binding on election officials of the 55 other counties of California in which the petitioners might choose to reside. Moreover, it is undisputed that in many of those other counties there are ex-felons among the resident population who have been or would be refused registration on the precise ground here challenged.[2] The case thus poses a question which is of broad public interest, is likely to recur, and should receive uniform resolution throughout the state. In such circumstances we deem it appropriate to exercise our inherent discretion to resolve the issue, "even though an event occurring during its pendency would normally render the matter moot." (In re William M. (1970) 3 Cal.3d 16, 23; accord, Liberty Mutual Ins. Co. v. Fales (1973) 8 Cal.3d 712, 715-716, and cases cited; see also Roe v. Wade (1973) ___ U.S. ___, ___, 41 U.S.L.Week 4213, 4217.) This

[2]Exact figures are difficult to obtain. Obviously almost every person convicted of felony and sentenced to prison sooner or later becomes an "ex-felon," and petitioners estimate there are 100,000 such persons in California today. Only those who wish to vote and who live in counties which refuse to register them, of course, are relevant here. Nevertheless we may fairly infer that their number is not insignificant, in view of (1) a recent survey of county election practices conducted by the Secretary of State, disclosing a wide variety of crimes which have been deemed to disqualify ex-felon applicants from voting, and (2) the strong likelihood that additional ex-felons have been discouraged by these laws and practices from even applying to register.

rule is particularly applicable to challenges to the validity of election laws. (See, e.g., Zeilenga v. Nelson (1971) 4 Cal.3d 716, 719-720; see also Goosby v. Osser (1973) ____ U.S. ____, ____, 41 U.S.L.Week 4167, 4168, fn. 2.)

One further preliminary point requires discussion. At the time petitioners were refused registration, respondents' constitutional authority was former article II, section 1, of the California Constitution, which provided in part that "no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State. . . ." By the passage of Proposition 7 at the November 7, 1972, general election the people repealed this language and substituted therefor the following new article II, section 3: "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." We consider the effect, if any, of this amendment.

It is first apparent that whereas the former section itself prohibited all persons convicted of an "infamous crime" from voting, the new section de-

clares that "The Legislature shall provide" for that result. We apprehend no difference in substance. As we explained in *Otsuka* (64 Cal.2d at pp. 607-608), since its first session the Legislature has often undertaken to implement the voting disqualifications of the Constitution, and the present Elections Code contains a number of statutes bearing on the exclusion of ex-felons from the franchise.[3] Petitioners candidly concede that the passage of Proposition 7 cannot reasonably be construed as an implied repeal of all such provisions, wiping the statute books clean for future legislation on the same subject. Repeals by implication are not favored (Warne v. Harkness (1963) 60 Cal.2d 579, 587-588), and at no time in the progress of Proposition 7 through the Legislature or during its presentation to the voters was there the slightest indication it was intended to have so drastic a result. It follows that the addition of the words, "The Legislature shall provide," must be interpreted merely as an express recognition of the legislative authority which has in fact been exercised since the earliest days of our state government. And in so specifying, new article II conforms its language with that of

[3]Sections 310 and 321 provide that the affidavit of registration shall show whether the affiant has been convicted of "a felony which disqualifies him from voting." Sections 383, 389, and 390 direct the county clerk to cancel the registration of all voters who have been convicted of "any infamous crime or of the embezzlement or misappropriation of any public money." Sections 14240 and 14246 permit a voter's qualifications to be challenged on the ground that he has been convicted of "a felony" or of "the embezzlement or misappropriation of public money."

article XX, section 11, which has provided since its adoption in 1879 that "Laws shall be made" to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, "or other high crimes." (See also Const. of 1849, art. XI, § 18.)

The second relevant change in wording brought about by the adoption of new article II, section 3, is the deletion of the word "ever" from the provision of former article II, section 1, that no person convicted of an infamous crime "shall ever exercise the privileges of an elector in this State." Again we perceive no change in legal effect. Even under the prior language a person denied the right to vote by reason of conviction of crime did not in actuality remain "forever" disfranchised: as we pointed out in *Otsuka* (at p. 604 of 64 Cal.2d), the Legislature has expressly provided for restoration of the right to vote to such persons "either by court order after completion of probation (Pen. Code, § 1203.4) or, if a prison term was served, by executive pardon after completion of rehabilitation proceedings (Pen. Code, §§ 4852.01-4852.17)." And no such legislation was necessary, of course, to restore the right to vote to a previously insane person who recovered his sanity, or to a former illiterate who achieved literacy. Accordingly, the sole possible meaning of the word "ever" as used in former article II, section 1, was that "at no time in the future" would a person under constitutional disqualification from voting be allowed to vote. Thus the word was merely emphatic surplusage, and with its deletion the Constitution reverted in this respect

to the simpler language of the first such provision in California law.[4]

We conclude that under both the present and former article II of our Constitution, the controlling issue is whether the disfranchisement of all persons who have been convicted of crime violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

When this issue was presented to us in Otsuka v. Hite (1966) supra, 64 Cal.2d 596, we resolved it by invoking the then current rules for applying the equal protection clause to a restriction on a fundamental interest such as the franchise. We began by identifying the "compelling state interest" served by denying ex-felons the right to vote. *(Id.* at pp. 602-603.) That interest, we determined, was "to protect 'the purity of the ballot box' against abuses by morally corrupt and dishonest voters operating to the detriment of the electorate as a whole" *(id.* at p. 611)—in short, to deter election fraud.

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[4]Article II, section 5, of the Constitution of 1849 declared that "No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector."

There is no merit in petitioners' argument that deletion of the word "ever" signifies that a person convicted of crime is hereafter disenfranchised only so long as he is on probation or is serving his sentence. In drafting the amendments which eventually became new article II, the California Law Revision Commission proposed express language to limit disenfranchisement to that period. (Cal. Const. Revision Com., Proposed Revision of the Cal. Constitution (1970) pt. 2, p. 18.) The Legislature, however, declined to adopt the change when it submitted Proposition 7 to the voters.

We then turned to the second branch of the prevailing equal protection test, namely, an inquiry into whether the restriction was "drawn with sufficient specificity." (*Id.* at p. 603.) At the time of *Otsuka*, however, the contours of that requirement had not been clearly delineated by the United States Supreme Court. The most recent authority then was Harper v. Virginia Board of Elections (1966) 383 U.S. 663, filed just 60 days before *Otsuka*. In holding that a state poll tax violated the equal protection clause, the high court reasoned (at p. 666) that "Voter qualifications have *no relation* to wealth nor to paying or not paying this or any other tax." (Italics added; fn. omitted.)[5] Hence it was still generally believed that the requirement of specificity was satisfied if the court could find a "reasonable relationship" between the restriction and the articulated state interest.

Our analysis in *Otsuka* followed the traditional path. We began (at p. 603) by quoting McLaughlin v. Florida (1964) 379 U.S. 184, 191, for the proposition that "The courts must reach and determine the question whether the classifications drawn in a statute are *reasonable* in light of its purpose." (Italics added.) We then demonstrated the "unreasonableness" of a classification which disfranchises all ex-felons without distinction: raising the possibility of

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[5]It was only several years later and with the advantages of hindsight that we were able to view *Harper* as a transitional decision, the "implication" of which was that "more than 'rationality' must be demanded of state voter qualifications." (Castro v. State of California (1970) 2 Cal.3d 223, 235.)

citizens losing the right to vote upon conviction of felonies of a comparatively minor nature, we cited *Harper* for the conclusion that "No *reasonable relation* is apparent between this result and the purpose of protecting the integrity of the elective process." (Italics added.) Such malum prohibitum conduct, we reiterated, may be "totally *unrelated* to the goal of preservation of the integrity of the elective process." (Italics added; fn. omitted.) (*Id.* at p. 606.)

Accordingly, in order to save the constitutionality of article II we held that it could be permitted to disfranchise only those voters who had been convicted of a certain limited class of offenses which we defined as follows (at p. 611): "the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it *may reasonably be deemed* to constitute a threat to the integrity of the elective process." (Italics added; fn. omitted.) Finding no such threat in the fact that the plaintiffs in *Otsuka* had been convicted 20 years earlier of refusing to serve in the armed forces because of conscientious objections, we reversed a judgment upholding a refusal to register them as voters.

In the seven years since *Otsuka*, however, the test for judging the constitutionality of a state-imposed limitation on the right to vote has become substantially more strict. At least since 1969 it is not enough that there be a rational relation between the restriction and the compelling state interest; the restriction is now constitutionally permissible only if it is "neces-

sary" to promote that interest, and to be "necessary" it must constitute, inter alia, the "least burdensome" alternative possible. We proceed to document this evolution of the law.

In Kramer v. Union School District (1969) 395 U.S. 621, the United States Supreme Court was called upon to review the constitutionality of a New York statute which excluded from voting in school district elections persons who neither owned nor leased real property in the district, or who were not parents of children in the local schools. The court set forth the controlling test in the following language (at pp. 626-627): "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a compelling state interest." (Italics added.)

The school authorities contended they had a compelling interest in limiting the right to vote in school district elections to persons "primarily interested in school affairs." The high court assumed arguendo that the claimed concern was legitimate, but emphasized (at p. 632) that the classifications resulting from the statute must nevertheless "be tailored so that the exclusion of appellant [a nonparent neither owning nor leasing real property in the district] and members of his class is *necessary* to achieve the articulated state goal." (Italics added; fn. omitted.) Invalidating the statute, the court held the classifications were not "necessary" in the sense that they were

both overinclusive and underinclusive.[6] (Accord, Cipriano v. City of Houma (1969) 395 U.S. 701; Turner v. Fouche (1970) 396 U.S. 346; Evans v. Kornman (1970) 398 U.S. 419; Phoenix v. Kolodziejski (1970) 399 U.S. 204.)

In two cases decided last term the United States Supreme Court struck down state-imposed restrictions on the franchise on the ground they were not "necessary" in yet another sense, i.e., they were not the least burdensome means available of achieving the articulated state interest. First, in Bullock v. Carter (1972) 405 U.S. 134, the court unanimously invalidated a Texas statutory scheme whereby certain candidates for public office were required to pay substantial filing fees for the right to run in primary elections. The court recognized that the state has a legitimate interest in regulating the number of candidates on the ballot and in protecting "the integrity of its political processes from frivolous or fraudulent candidacies." (*Id.* at p. 145.) The court also conceded that large filing fees will tend in fact to limit the number of candidates on the ballot, and "There may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness with which he takes his candidacy" (*id.* at pp. 145-146). Nevertheless the court ruled (at p. 146) not only that the filing fee require-

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[6] "The classifications in [the New York statute] permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions." (Fn. omitted.) (*Id.* at p. 632.)

ment was both underinclusive and overinclusive, but also that "other means to protect those valid interests are available." The court did not articulate the "other means" intended, but we infer from its reliance on Jenness v. Fortson (1971) 403 U.S. 431, that such means at least include the use of nominating petitions signed by a prescribed percentage of registered voters.

Even more in point is Dunn v. Blumstein (1972) 405 U.S. 330, decided a month after *Bullock*. At issue in *Dunn* was the constitutionality of the requirements of Tennessee law that a voter be a resident of the state for one year and of the county for 90 days in order to exercise the suffrage. The high court reiterated the strict equal protection test of *Kramer (id.* at p. 342), and emphasized in particular that "It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' [citations] and must be 'tailored' to serve their legitimate objectives. [Citation.] And if there are *other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity,* a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" (Italics added.) *(Id.* at p. 343.)

Tennessee first contended it had a compelling interest in "preserving the purity of the ballot box." The high court apparently found this phraseology some-

what overblown, calling it a "formidable sounding" state interest. (*Id.* at p. 345.) But the court then conceded that when the purpose of the statutory scheme is narrowed down to prevention of election fraud by nonresidents' falsely swearing they are eligible to vote, it does constitute a legitimate governmental goal. Nevertheless, the court held that durational residence requirements were not "necessary" to achieve that goal because two less burdensome means of doing so were available.

First, the court stressed that early abuses have been eliminated by the development of elaborate procedural safeguards governing election practices: "Durational residence laws may once have been necessary to prevent a fraudulent evasion of state voter standards, but today in Tennessee, as in most other States, this purpose is served by a system of voter registration. [Citations.] Given this system, the record is totally devoid of any evidence that durational residence requirements are in fact necessary to identify bona fide residents." (Fn. omitted.) (*Id.* at p. 346.)

Second, the court gave full weight to the fact that election fraud in Tennessee is also punishable as a crime: "Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws which are more than adequate to detect and deter whatever fraud may be feared." (Fn. omitted.) (*Id.* at p. 353.) After reviewing a half-dozen Tennessee statutes defining "offenses to deal with voter fraud," the court

concluded (at pp. 353-354): "Where a State has available such remedial action to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities such as durational residence requirements are needed to deal with the evils of fraud." (See also United States v. State of Texas (W.D.Tex. 1966) 252 F.Supp. 234, 251, fn. 71, motion to affirm granted without opinion, 384 U.S. 155.)[7]

This constitutional evolution finds its parallel in the decisions of our court since *Otsuka*. To begin with, in Castro v. State of California (1970) supra, 2 Cal. 3d 223, 235, we explicitly recognized for the first time that in *Kramer* the United States Supreme Court "announced the new constitutional standard" discussed above. Applying that standard, we reviewed a requirement in the very constitutional provision here in issue—former article II, section 1—that voters be literate in the English language. We began by identifying a compelling state interest served by that requirement, namely, "California's concern that those of her citizens who are eligible to vote likewise be capable of informed decisions on matters submitted to the electorate" (*id.* at p. 237). But the remainder of our opinion was devoted to showing that literacy

[7]As an additional compelling state interest, Tennessee urged that long-time residents are more likely to vote intelligently because they are more informed about local issues. Without deciding whether this is a legitimate state concern, the court ruled that durational residence requirements are both underinclusive and overinclusive for this purpose, and concluded: "Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest." (*Id.* at p. 360.)

in English is not "necessary" to promote that concern because of the existence of a reasonable alternative, i.e., access by persons literate in Spanish to spoken or printed sources of political information in the Spanish language comparable to those available in English. (*Id.* at pp. 238-242.) As to such persons, we concluded, the English literacy requirement could not constitutionally be applied.[8]

In a group of cases after *Castro* not involving the exercise of the franchise but challenging statutes affecting other fundamental rights or based on suspect classifications, we likewise held that a restriction which is not the least burdensome available is not "necessary" to promote any state interest.[9] In In re Antazo (1970) 3 Cal.3d 100, we assumed arguendo that imprisonment of indigent defendants sentenced to pay a fine served the state's claimed purposes of collecting such fines and rehabilitating the offenders. We concluded, however, that imprisonment was not "necessary" to promote either purpose because the state has available to it alternative and less burdensome means of enforcing payment of fines. (*Id.* at pp. 114-115.)

Again, in Zeilenga v. Nelson (1971) supra, 4 Cal.3d 716, Camara v. Mellon (1971) 4 Cal.3d 714, and

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[8]Although vacated on other grounds (403 U.S. 915), our decision in Westbrook v.Mihaly (1970) 2 Cal.3d 765, 788-795, adopted a similar analysis in invalidating the requirement of two-thirds approval of those voting for passage of local general obligation bond issues.

[9]In two additional decisions we found no compelling state interest whatever, and therefore did not reach the question of necessity. (Raffaelli v. Committee of Bar Examiners (1972) 7 Cal.3d 288, 301; In re Gary W. (1971) 5 Cal.3d 296, 308.)

Thompson v. Mellon (1973) ..... Cal.3d ....., we held that residence requirements of five, three, and two years respectively for candidacy for public office were not necessary to insure that the candidate was knowledgeable about local conditions, because such requirements were not the "least restrictive method" of doing so. (*Id.* at p. 723.) In Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, we ruled that the prohibition against women bartenders was not necessary to prevent improprieties in the sale of alcoholic beverages because that evil "can be directly prevented through nondiscriminatory legislation" such as general regulatory and penal statutes. (*Id.* at pp. 20-21.) And in Serrano v. Priest (1971) 5 Cal.3d 584, we declared that California's school financing system was not "necessary" to promote either of the two compelling interests asserted, i.e., administrative and fiscal control over the schools at the local level. (*Id*, at pp. 610-611.)

Finally, we applied this test in a recent voting rights case. The issue in Young v. Gnoss (1972) supra, 7 Cal.3d 18, was the constitutionality of the requirements of California law that a voter be a resident of the county for 90 days and of the precinct for 54 days in order to exercise the suffrage. After rejecting certain claimed justifications for these durational residence requirements as insufficiently compelling (*id.* at pp. 24-26), we considered the asserted need to furnish local election officers with affidavits of registration and indexes of registered voters so as to permit identification of prospective voters. The timely

delivery of such documents, we said, is "essential to the conduct of the election, and constitutes a compelling governmental interest. But the question remains whether the closing of registration 54 days before the election is *necessary* to achieve that goal." (Italics added.) (*Id.* at p. 26.)

We found no such necessity. Instead, we emphasized that alternate means were available to solve the problem of a last-minute influx of registrations, e.g., by delivering the affidavit books and voter indexes in two cycles rather than one. (See also Stats. 1972, ch. 1356.) We therefore concluded (at pp. 26-27) that to cut off all registration 54 days before the election in order to promote this governmental purpose "is *not* the method which is the least burdensome on the exercise of the right of suffrage within the meaning of *Dunn*." (Italics in original.)

In the light of this evolution of the law of equal protection, the analysis in *Otsuka* of the constitutionality of disfranchising persons convicted of crime appears no longer adequate.[10] For present purposes we may adhere to the determination in *Otsuka* that the purpose of that disfranchisement is to deter election fraud; but we must now also consider whether so

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[10]For the same reason, three federal cases on disfranchisement of ex-felons are no longer persuasive. (Green v. Board of Elections of City of New York (2d Cir. 1967) 380 F.2d 445; Kronlund v. Honstein (N.D. Ga. 1971) 327 F.Supp. 71; Beacham v. Braterman (S.D. Fla. 1969) 300 F.Supp. 182, motion to affirm granted without opinion, 396 U.S. 12.) Later federal decisions have appropriately distinguished these precedents. (Dillenburg v. Kramer (9th Cir. 1972) 469 F.2d 1222, 1225-1226; Stephens v. Yeomans (D.N.J. 1970) 327 F.Supp. 1182, 1185-1187.)

drastic a remedy is "necessary in the sense that it is the least burdensome means available to achieve that goal." (Young v. Gnoss (1972) supra, 7 Cal.3d 18, 22.) We shall find the answer to our inquiry, as did the United States Supreme Court in *Dunn*, by examining the state's "total statutory scheme for regulating the franchise." (405 U.S. at p. 346.)

In the early years of California political history, that scheme was rudimentary at best. The first act to regulate elections (Stats. 1850, ch. 38, p. 101) included only a handful of sections governing the casting and counting of votes. The statute declared that "The voting shall be by ballot" (§24), but made no provision for furnishing official ballots printed by the state and uniform in appearance and content. Instead, each voter brought his own ballot or "ticket" to the polls, consisting of a piece of paper on which he had written—or, more commonly, a political party or candidate had printed—his choices for the various offices.[11]

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[11]"The tickets were merely long, narrow slips of paper, headed by a vignette, on which were printed the names of a party's candidates for each office. They were given out to the faithful on election day by party ticket peddlers who stationed themselves on the streets and corners around the polls. This system was frequently abused. In some of the more partisan wards a voter could search blocks and blocks before finding a consentient ticket peddler. Even with ticket in hand the elector had to maintain his vigilance, for it was not uncommon for contending factions or parties to counterfeit their opponents' tickets substituting one or two of their own for the names listed on the regular ticket. Under these circumstances, if the elector was not wary, he might then vote for a couple of opposition candidates, while under the impression he was casting a straight party ticket." (Petersen, *The Struggle for the Australian Ballot in California* (1972) 51 Cal. Hist. Q. 227-228; see also Kirk v. Rhoads (1873) 46 Cal. 398, 406.)

Although challenges were permitted (§§ 27-31), no voter was required to register, and the ballots were obviously not numbered. The statute simply provided (§ 25) that "Whenever any person offers to vote, the Inspector shall pronounce his name in an audible voice, and if there be no objection to the qualification of such person as an elector, shall receive his ballot, and in the presence of the other Judges put the same, without being opened or examined, into the ballot box." The system thus made it possible for unqualified persons such as nonresidents or aliens to vote, and for a voter in a single election to cast a ballot more than one time or at more than one polling place. Moreover, "Because the ballot box usually stood in the center of a public room, secret voting was difficult and manipulation relatively easy." (Petersen, *op. cit.* supra, p. 229.)[12]

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[12]A contemporary eyewitness account of an early California election describes as follows a not uncommon method of manipulating available aliens: "The various candidates, for example, would round up these prospective voters like so many cattle, confine them in corrals (usually in the neighborhood of Boyle Heights), keep them in a truly magnificent state of intoxication until the eventful morning, and then put them in stages hired from either Banning or Tomlinson for the purpose; and from the time the temporary prisoners left the corral until their votes had been securely deposited, they were closely watched by guards. On reaching the voting place, the captives were unloaded from the stage like so much inanimate baggage, and turned over to friends of the candidate to whom, so to speak, for the time being they belonged. One at a time, these creatures were led to vote; and as each staggered to the ballot-box, a ticket was held up and he was made to deposit it. Once having served the purpose, he was turned loose and remained free until another election unless, as I have intimated, he and his fellows were again corralled and made to vote a second or even a third time the same day." (Newmark, Sixty Years in Southern California (4th ed. 1970) p. 42.)

Finally, "The problem was compounded because the dominant political faction in a precinct, ward, or county, usually controlled the appointment of election officials. Therefore, even if the voting was conducted by the rules, it was uncertain whether the ballots would be honestly tabulated." (Petersen, *op. cit.* supra, p. 229.) Little assurance could be gained from the statute, which provided only that after closing the polls the election officials were to open the ballot box, count the ballots, and send the totals to the county clerk either by mail or "by private hand." (§§ 33-36.)

In such circumstances the disfranchisement of persons convicted of an "infamous crime" (§ 12) may well have been necessary to minimize the more egregious frauds practiced on the electorate by unscrupulous candidates or voters. But the law on this subject has not remained static. In the ensuing century there have been numerous movements for electoral reform, resulting in a complex series of amendments to the voting laws. To cite only the major legislative efforts to curb election fraud, we note that in 1866 the first voter registration act was adopted. (Stats. 1865-1866, ch. 265, p. 288.) In 1872 the new Political Code required that every ballot "be of paper uniform in size, color, weight, texture, and appearance" (§ 1187), specified in detail the size and content of the ballot (§ 1191), and directed the Secretary of State to procure and sell such paper to the public (§§ 1188-1189). The code also contained elaborate provisions designed to promote secrecy in voting by forbidding that a

ballot be marked on the outside or folded in any manner intended to indicate its contents. (§§ 1196-1199, 1206-1207.)

Voting secrecy was assured, however, by the adoption of the Australian ballot two decades later. (Stats. 1891, ch. 130, p. 165.) Under this legislation all ballots were furnished at public expense (§ 1, on paper bearing an undisclosed watermark (§ 12), consecutively numbered with a corresponding stub (§ 13), and printed with the names of the duly nominated candidates in alphabetical order *(ibid.)*. In addition, private booths were provided for the actual marking of the ballots (§ 19); each voter received his ballot directly from the election official at the polls (§ 20); and in marking his ballot each voter was required to use a stamp and ink pad furnished in the voting booth (§ 21).

After several false starts, the Legislature has also taken advantage of various technological developments in the election process. Each such development, of course, has tended to make it more difficult for dishonest individuals to tamper with either the casting or the counting of the ballots. Thus in 1903 the use of voting machines was authorized, permitting mechanical tabulation of results. (Stats. 1903, ch. 226, p. 262; see also Stats. 1923, ch. 96, p. 182.) In 1949 the Legislature provided for punch-card voting and electromechanical tabulation. (Stats. 1949, ch. 41, p. 57.) And in 1953 it authorized the marking of ballots by specially prepared pencils, with consequent electronic tabulation of the vote. (Stats. 1953, ch. 1046, p. 2514.)

Taken together, these and other reforms of the past hundred years have radically diminished the possibility of election fraud in California. The voting and counting process is now thoroughly hemmed in by control mechanisms at every stage, so that deliberate irregularities, "if present today, are rare and have negligible effects on election results." (Note (1967) 14 U.C.L.A. L.Rev. 699, 702 (reporting that the Los Angeles County Registrar of Voters had received no complaints of this type for the previous 41 years).) In sum, it may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, premarked ballots, and transportation to the polls; to do so in 1973, if possible at all, would require the co-ordinated skills of a vast squadron of computer technicians.[13]

Turning to the second point emphasized in *Dunn*—the range of penal sanctions available to prevent election fraud—we observe a similar development. The California Constitution has directed since its inception that the right to vote shall be supported by laws not only regulating elections but also "prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice." (Const. of 1849, art. XI, § 18; Const. of 1879, art. XX, § 11; new art. II, § 3, eff. Nov. 8, 1972.) The response of the Legislature to this

[13]The Legislature itself has recognized the contemporary irrelevance of the availability of liquor to election results by repealing its long-standing ban on the sale of alcoholic beverages during polling hours. (Former Bus. & Prof. Code, § 25630, repealed by Stats. 1969, ch. 614, p. 1253.)

directive has grown dramatically over the years. The first election law denominated only eight offenses against the franchise, and all were punishable as misdemeanors. (Stats. 1850, ch. 38, pp. 110-111, §§ 98-105.) Today, in sharp contrast, the Elections Code punishes at least 76 different acts as felonies, in 33 separate sections; at least 60 additional acts are punished as misdemeanors, in 40 separate sections; and 14 more acts are declared to be felony-misdemeanors.[14] Among this plethora of offenses we take particular note, in the present connection, of the felony sanctions against fraudulent registrations (§ 220), buying and selling of votes (§§ 12000-12008),[15]

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[14]We noted some of these sanctions in *Otsuka* (64 Cal.2d at p. 603, fn. 3), but of course did not view them in the light thereafter cast on the issue by *Dunn*.

[15]Certain of these provisions are especially elaborate:

Section 12000: "A person shall not directly or through any other person receive, agree, or contract for, before or during an election, any money, gift, loan, or other valuable consideration, office, place, or employment for himself or any other person for either:

"(a) Voting or agreeing to vote.

"(b) Coming or agreeing to come to the polls.

"(c) Refraining or agreeing to refrain from voting.

"(d) Voting or agreeing to vote for any particular person.

"(e) Refraining or agreeing to refrain from voting for any particular person."

Section 12001: "A person shall not directly or through any other person receive any money or other valuable thing, during or after an election, because he or any other person:

"(a) Voted or refrained from voting for any particular person.

"(b) Came to the polls or remained away from the polls.

"(c) Induced any other person to:

"(1) Vote or refrain from voting.

"(2) Vote or refrain from voting for any particular person.

"(3) Come to or remain away from the polls."

Section 12003: "A person shall not directly or through any other person pay, lend, or contribute, or offer or promise to pay,

intimidating voters by threat or bribery (§§ 29130-29135), voting twice, or fraudulently voting without being entitled to do so, or impersonating another voter (§§ 14403, 29430-29431), fraud or forgery in casting absentee ballots (§§ 14690-14692), tampering with voting machines (§ 15280) or ballot boxes (§§ 17090-17092), forging or altering election returns (§§ 29100-29103), and so interfering "with the officers holding an election or conducting a canvass, or with the voters lawfully exercising their rights of voting at an election, as to prevent the election or canvass from being fairly held and lawfully conducted" (§ 17093).[16] These sanctions are even more pervasive than those characterized by the Supreme Court in *Dunn* as "more than adequate to detect and

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lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person to:

"(a) Induce the voter to:

"(1) Vote or refrain from voting at any election.

"(2) Vote or refrain from voting at an election for any particular person.

"(3) Come to the polls at an election.

"(4) Remain away from the polls at an election.

"(b) Reward the voter for having:

"(1) Voted.

"(2) Refrained from voting.

"(3) Voted for any particular person.

"(4) Refrained from voting for any particular person.

"(5) Come to the polls at an election.

"(6) Remained away from the polls at an election."

Each of these offenses is punishable by an indeterminate prison term of one to seven years. (§ 12012.)

[16]In addition, the code contains a great many directives of all kinds to the various participants in the election process, and declares generally that "Every person who willfully violates *any* of the provisions of the laws of this State relating to election is, unless a different punishment is prescribed by this code, punishable by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in the state prison not exceeding five years, or by both." (Italics added.) (§ 29001; see also § 29002.)

deter whatever fraud may be feared." (405 U.S. at p. 353.)

In holding that a challenge to state laws identical to those here in issue required the convening of a three-judge federal court, the Ninth Circuit Court of Appeals reasoned: "Earlier in our constitutional history, laws disenfranchising persons convicted of crime may have been immune from attack. But constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber. 'Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.' (Harper v. Virginia Board of Elections (1966) 383 U.S. 663, 669, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169.) In the wake of the many decisions dismantling restrictions on voting rights, we cannot say that this challenge to Washington laws is now unsubstantial." (Dillenburg v. Kramer (1972) supra, 469 F.2d 1222, 1226.)[17]

The same challenge to California's laws on this topic is not only substantial, it is meritorious. For the reasons stated in *Dunn,* we hold that the enforcement of modern statutes regulating the voting process and penalizing its misuse—rather than outright disfranchisement of persons convicted of crime—is today the method of preventing election fraud which is the least burdensome on the right of suffrage. It follows that such disfranchisement is not "necessary,"

[17]Similarly, the United States Supreme Court recently ruled that a substantial constitutional issue was presented by an attack on a Pennsylvania statute which prohibits from voting all persons confined in penal institutions awaiting trial. (Goosby v. Osser (1973) supra, ___ U.S. ___, 41 U.S.L.Week 4167.)

within the meaning of *Dunn* and its predecessors, to achieve that goal. We conclude that, as applied to all ex-felons whose terms of incarceration and parole have expired, the provisions of article II and article XX, section 11, of the California Constitution denying the right of suffrage to persons convicted of crime, together with the several sections of the Elections Code implementing that disqualification *(ante,* fn. 3), violate the equal protection clause of the Fourteenth Amendment.[18]

The alternative writ, having served its purpose, is discharged, and the petition for peremptory writ is denied. All parties shall recover their costs from the State of California. (See Code Civ. Proc., § 1095.)

Mosk, J.

We Concur:

Wright, C.J.
McComb, J.
Tobriner, J.
Burke, J.
Sullivan, J.
*Taylor, J.

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[18]Respondent Secretary of State asks us to reaffirm the constitutionality of statutes which deny the suffrage to all felons who are currently incarcerated or on parole. (Pen. Code, §§ 2600, 3054.) The question whether the disfranchisement of such persons is today constitutionally permissible is not presented in the case at bar. The individual petitioners herein have all been discharged from prison and have successfully completed their parole; the prayer of the petition requests only that respondents be directed to register ex-felons whose terms of incarceration and parole have expired, and our alternative writ was so limited.

*Assigned by the Chairman of the Judicial Council.

§ 310. Affidavit of registration; contents

The affidavit of registration shall show:

(a) The facts necessary to establish the affiant as an elector.

(b) Affiant's name at length, including his given name, and a middle name or initial, or if the initial of his given name is customarily used, then the initial and middle name. The given name of a woman shall be preceded in all cases by the designation of Miss or Mrs.

(c) Affiant's place of residence and post-office address with sufficient particularity to identify it and to determine affiant's voting precinct.

(d) Affiant's occupation.

(e) The country or state of affiant's birth.

(f) If foreign born, how citizenship was acquired, whether by:

(1) Citizenship of father.

(2) Treaty or act of Congress.

(3) Order of a court of naturalization.

(4) Marriage to a citizen.

(5) Naturalization of a parent or husband.

The date or year when and the place where the affiant became a citizen shall be stated except in the case of citizenship acquired by citizenship or natural-

ization of parents, by treaty, or by act of Congress. When citizenship depends upon the citizenship or naturalization of a parent or husband, the name of the parent or husband shall be stated.

(g) Whether the elector is able to read the Constitution in the English language and to write his name, and whether the elector has any physical disability by reason of which he cannot mark the ballot, in which case the nature of such disability shall be stated.

(h) That the affiant is not disqualified to vote by reason of a felony conviction.

The affiant shall sign the affidavit with his name at length, including given name, middle name or initial, or initial and middle name, and if he is unable to write he shall sign with a mark or cross, and the person before whom the affidavit is made shall insert the date of the affidavit, which shall be the date of the jurat. (Stats. 1961, c. 23, p.——, § 310.)

§ 321. Form of affidavit

Subject to the provisions of this chapter, the body of the affidavit of registration shall be substantially in the following form:

For transfer or change of name

I am registered under the name of.....
in..... Assembly District, ... precinct in said county and request that said registration be cancelled.

AFFIDAVIT OF REGISTRATION

State of California,
County of (.....)—ss.

The undersigned affiant, being duly sworn, says: I will be at least 21 years of age at the time of the next succeeding election, a citizen of the United States 90 days prior thereto, and a resident of the State one year, of the county 90 days, and of the precinct 54 days next preceding such election, and will be an elector of this county at the next succeeding election.

1. I am not now registered as a voter in this State. (If now registered in this county under this or another name, mark out word "not" and fill out transfer clause at top. If now registered in another county, mark out word "not" and execute a separate affidavit of cancellation before registering.)

2. My full name is .....
(including Christian or given name, and middle name or initial and in case of women, the prefix Miss or Mrs.).

3. My residence is .....
between..... and..... Streets, ...
floor, Room.....

4. My occupation is .....

5. My height is..... feet..... inches.

6. I was born in .....
(State or country)

7. I acquired citizenship by (underline method of acquiring citizenship):

a. Decree of court.
b. (Father's naturalization.
(Mother's naturalization.
c. Citizenship of father.
d. Marriage to a citizen.
e. Naturalization of my husband.
f. Act of Congress.
g. Treaty.

When(month / day / year)_____ Where(city / state)_____

My (father's / husband's / mother's) name is (was)_____

(To be filled out when citizenship depends on citizenship or naturalization of parent or husband.)

8. I can_____read the Constitution in the English language; I can_____write my name; I am entitled to vote by reason of having been on October 10, 1911 (a) An elector. (b) More than 60 years of age.

I can_____mark my ballot by reason of_____(State physical disability, if any.)

9. I intend to affiliate at the ensuing primary election with the_____party. (If affiliation is not given, write or stamp "Declines to state.")

10. I am not disqualified to vote by reason of a felony conviction.

_____

(Affiant sign here.)

Residence _____

Subscribed and sworn to before me this _____ day of_____, 19____

_____

County Clerk.

By _____

Deputy County Clerk.

Assembly District_____.

Post office address is_____ Precinct_____

Rural Route No._____ Box No._____

(Stats. 1961, c. 23, p._____, § 321.)

§ 383. Grounds for cancellation

The county clerk shall cancel the registration in the following cases:

(a) At the request of the person registered.

(b) When the insanity of the person registered is legally established.

(c) Upon the production of a certified copy of a subsisting judgment of the conviction of the person registered of any infamous crime or of the embezzlement or misappropriation of any public money.

(d) Upon the production of a certified copy of a judgment directing the cancellation to be made.

(e) Upon the death of the person registered.

(f) If the person registered has not voted at the preceding general election unless the clerk, prior to the time he has canceled the registration, has had written notice from the voter that the voter still resides and has not removed from the residence address stated in the affidavit of registration, or the clerk has had written notice from the voter, or a friend of the voter, that the voter is a war voter, in which case he shall not cancel the registration, but it shall remain permanent unless canceled for any other cause enumerated in this section. If the county clerk has already canceled the affidavit of registration, then upon receipt of the proper information within 30 days after mailing the notice provided for in Section 387, or 60 days in the case of a war voter, he shall restore the affidavit of registration to the files. Stats. 1961, c. 23, p. ——, § 383.)

§ 389. Criminal conviction; cancellation of registration

The county clerk, on the basis of the records of ber in each year, examine the records of the courts having jurisdiction in case of infamous crimes and the embezzlement or misappropriation of public money, and shall cancel the affidavits of registration of all voters who have been finally convicted of an infamous crime or of the embezzlement or misappropriation of public money.

As used in this section, "county clerk" does not include "registrar of voters." (Stats.1961, c. 23, p. ——, § 389.)

§ 390. Record of criminal conviction

The county clerk, on this basis of the records of courts in the county having jurisdiction of such offenses, shall furnish to the registrar of voters in a county where there is a registrar of voters, before the first day of September of each year, a statement showing the names of all persons convicted of infamous crimes or of the embezzlement or misappropriation of public money during the year prior to that first day of September, whose convictions have become final. The registrar of voters shall, during the first week of September in each year, cancel the affidavits of registration of such persons. The county clerk shall certify the statement under the seal of his office.

As used in this section "county clerk" does not include "registrar of voters." (Stats.1961, c. 23, p. ——, § 390.)

§ 14240. Grounds for oral challenge; posting eligibility information

A person offering to vote may be orally challenged within the polling place only by a member of the precinct board upon any or all of the following grounds:

(a) That he is not the person whose name appears on the register.

(b) That he has not been a resident of the state one next next preceding the election.

(c) That he * * * is not a citizen of the United States * * *.

Asterisks * * * indicate deletions by amendment

(d) That he has not been a resident of the county for 90 days preceding the election.

(e) That he has not been a resident of the precinct for 54 days next preceding the election.

(f) That he has voted that day.

(g) That he has been convicted of a felony.

(h) That he has been convicted of the embezzlement or misappropriation of public money.

On the day of the election no person, other than a member of a precinct board or other official responsible for the conduct of the election, shall challenge any voter or question him concerning his qualifications to vote.

If any member of a precinct board receives, by mail or otherwise, any document or list concerning the residence or other voting qualifications of any person or persons, with the express or implied suggestion, request, or remand that such person or persons be challenged, he shall first determine whether the document or list contains or is accompanied by evidence constituting probable cause to justify or substantiate a challenge. In any case, before making any use whatever of such a list or document, the member of the precinct board shall immediately contact the

clerk, charged with the duty of conducting the election, and describe to him the contents of such document or list and such evidence, if any, received bearing on voting qualifications. The clerk shall advise the members of the precinct board as to the sufficiency of probable cause for instituting and substantiating the challenge and as to the law as herein provided, relating to hearings and procedures for challenges by members of the precinct board and determination thereof by a precinct board. The clerk may, if necessary, designate a deputy to receive and answer inquiries from precinct board members as herein provided.

No person shall post or cause to have posted any poster, bill, or placard containing any information concerning eligibility to vote to be displayed on the day of the election within 500 feet of the entrance to a polling place.

(Amended by Stats.1963, c. 1560, p. 3143, § 1; Stats. 1965, c. 1908, p. 4417, §1; Stats.1967, c. 208, p. 1334, § 1; Stats.1971, c. 1760, p. 3807, § 2, urgency, eff. Dec. 16, 1971.)

§ 14246. Oath of criminal conviction

If the challenge is on the ground that the person challenged has been convicted of * * * a felony or

Asterisks * * * indicate deletions by amendment

that he has been convicted of the embezzlement or misappropriation of public money, he shall not be questioned, but the fact may be proved by the pro-

duction of an authenticated copy of the record or by the sworn oral testimony of two witnesses. As amended Stats.1965, c. 1908, p. 4419, § 4.)

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PENAL CODE

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§ 1203.4. Discharged probationer; change of plea or vacation of verdict; dismissal of charge; release from penalties and disabilities; application; pleading prior conviction in prosecution for subsequent offenses

(a) * * * In any case in which a defendant * * * has fulfilled the conditions of * * * probation for the entire period * * * of probation, or has been discharged * * * prior to the termination of the period * * * of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time * * * after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has

been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change of plea in person or by attorney, or by the probation officer authorized in writing; provided, that, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.

Dismissal of an accusation of information pursuant to this section does not permit a person to own, possess, or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021.

This subdivision shall apply to all applications for relief under this section which are filed on or after * * * November 23, 1970.

Asterisks * * * indicate deletions by amendment

§ 4852.01. Notice of intention to apply for certificate of rehabilitation and pardon; application of Chapter

(a) Any person convicted of a felony who has been released from a state prison or other state penal institution or agency in California, whether discharged on completion of the term for which he was sentenced or released on parole prior to May 13, 1943, who has not been incarcerated in a state prison or other state penal institution or agency since his release and who presents satisfactory evidence of a

three-year residence in this State immediately prior to the filing of the petition for a certificate of rehabilitation and pardon provided for by this chapter, may at any time file with the clerk of the county in which he resides a notice of intention to petition for such certificate and pardon, and may at any time after his discharge from custody and termination of his parole file such petition.

(b) Any person convicted of a felony who, on May 13, 1943, was confined in a state prison or other institution or agency to which he was committed and any person convicted of a felony after that date who is committed to a state prison or other institution or agency may file with the clerk of the county in which he resides, at any time after his discharge from custody or release on parole, a notice of intention to apply for a certificate of rehabilitation and pardon in accordance with the provisions of this chapter.

(c) This chapter shall not apply to persons convicted of misdemeanors; to persons who have served time in county jails only; to persons serving a mandatory life parole; to persons committed under death sentences; or to persons in the military service.

§ 4852.13. Certificate of rehabilitation; finding; contents; filing

If, after hearing, the court finds that the petitioner has demonstrated by his course of conduct his rehabilitation and his fitness to exercise all of the civil and political rights of citizenship, the court shall make an order declaring that the petitioner has been

rehabilitated, and recommending that the Governor grant a full pardon to the petitioner. Such order shall be filed with the clerk of the court, and shall be known as a certificate of rehabilitation. The certificate shall show the date on which the original notice of intention to apply for a certificate was filed.

§ 4852.16. Pardon; certificate as application; issuance; recommendation

The certified copy of a certificate of rehabilitation transmitted to the Governor shall constitute an application for a full pardon upon receipt of which the Governor may, without any further investigation, issue a pardon to the person named therein, except that, pursuant to Section 1 of Article VII of the Constitution, the Governor shall not grant a pardon to any person twice convicted of felony, except upon the written recommendation of a majority of the judges of the Supreme Court.

§ 4852.17. Report of certificate of rehabilitation or pardon; rights restored by pardon; exceptions

Whenever a person is issued a certificate of rehabilitation or granted a pardon from the Governor under this chapter, the fact shall be immediately reported to the * * * Department of Justice by the court, Governor, officer, or governmental agency by whose official action the certificate is issued or the pardon granted. The * * * Department of Justice shall immediately record the facts so reported on the

former criminal record of the person, and transmit such facts to the Federal Bureau of Investigation at Washington, D.C. When the criminal record is thereafter reported by said * * * department, it shall also report the fact that the person has received a certificate of rehabilitation, or pardon, or both.

Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including but not limited to: (1) the right to vote; (2) the right to own, possess, and keep any type of firearm that may lawfully be owned and possessed by other citizens; except that this right shall not be restored, and Sections 12001 and 12021 of the Penal Code shall apply, if the person was ever convicted of a felony involving the use of an dangerous weapon.